IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

I.T.R. No.130 of 1987
Date of decision: 15.09.2006

The Commissioner of Income Tax, Patiala.

---Applicant

Vs.

M/s Punjab Kesari Hosiery Factory, Ludhiana.

-----Respondent

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE RAJESH BINDAL

Present: Mr. S.K. Garg Narwana, Advocate
for the applicant.

ORDER:

Following questions of law have been referred for opinion of this Court by the Income Tax Appellate Tribunal, Chandigarh, arising out of its order dated 31.08.1976 in respect of assessment year 1967-68:-

"1) Whether on a proper interpretation of section 271(1)(c) of the Income-tax Act, 1961, the Appellate Tribunal is right in law in holding that where a case falls under the Explanation is section 271(1)(c), only the minimum penalty is leviable u/s 271(1)(iii)?

2) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the main provision of section 271(1)(c) of the Act and the provisions of the Explanation thereto are

mutually exclusive so that they cannot operate in the same field?

3) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in deleting the penalty levied u/s 271(1)(c) of the Act in respect of the addition of Rs.1,26,000/-, the admitted value of the stock which was not accounted for?"

The facts of the case, as noticed in the statement of case submitted by the Tribunal, are as under:-

"The assessee is a registered firm which was manufacturing, selling and exporting goods. The assessment year involved is 1967-68 for which the relevant accounting period ended on 31.3.1967. Return of income was filed on 31.10.1967 showing total income of Rs. 3,15,450/- and it was further revised on 28.2.1973 in which income was shown in a sum of Rs.3,17,641/-. The assessment was framed under section 143(3) of the Income-tax Act, 1961 (for short, "the Act") on 28.2.1973, as per which total income was determined at Rs.7,59,120/-. By a letter dated 24.7.1972, the assessee contended that according to section 153 of the Act, the assessment should have been completed by 31.3.1967 and that not having been done assessment had become 'time-barred' and, therefore, was a nullity. The Income-tax Officer rejected the said contention of the assessee and observed that the case fell within the mischief of section 271 (1)(c) of the Act and, therefore, under the provisions of Section 153(1)(b) of the Act, limit of eight years from the end of the assessment year in which income was first assessable, applied. The Income-tax Officer in this context referred to his notices dated 6.11.1971 and 22.12.1971 u/s (3) of the Act pointing out that various defects and discrepancies had been noted

which were the basis for bring in the provisions of section 271(1)(c) read with section 153(1) (b) of the Act. He further stated that his predecessor had duly recorded his satisfaction regarding the assessee being guilty of concealment of income within the meaning of section 271(1) of the Act.

The matter was carried by the assessee before the AAC, who did not agree with the Income-tax Officer that the assessee's case was covered by the provisions of section 153(1)(b) of the Act, as, according to him, there was no positive evidence on record to prove that the assessee was guilty of concealment of income within the meaning of section 271(1) (C) of the Act. The Tribunal while adjudicating the penalty appeal, took note of the above observations and finding in order to point out that unless were shown to have been disturbed or vacated, it was difficult to go with the revenue that mere assessment or certain additions which happened to be substantially modified by the AAC, the CIT as also by the Tribunal's could have the effect of penalising the assessee on the charge of concealment with the help of the main provisions of section 271(1)(c) of the Act. According to the AAC, the letters dated 6.11.1971 and 22.12.1971 written by the Income-tax Officer to the assessee sought clarification and reconciliation of certain discrepancies noticed in the books of account and did not have the effect of establishing any concealment within the meaning of section 271(a)(c) of the Act. The AAC further observed that a request from the assessee for entering into a settlement with the CIT (agreeing to be assessee in respect of certain shortage in the closing stocks to the tune of Rs. 1,96,000/-) was not an admission on the part of the assessee of any concealment of income. The AAC, however, did not accept the assessee's case that assessment was

void as according to him, the provisions of Section 139(4) of the Act were wide enough to cover not only a late but even a revised return after filling of the belated return. The AAC was also of the opinion that a return u/s 139(4) of the Act could be filed at any time before the end of the period mentioned in clause (b) and such a return could be an original or a revised return. Therefore, according to the AAC, extended time limit of one year u/s 153(1)(c) of the Act would apply to an original or a revised return u/s 139(4) of the Act. The assessee and the revenue both felt aggrieved by this decision of the AAC. The assessee filed a regular appeal and the revenue a cross objection.

The Tribunal, however, did not agree with the assessee's plea. The Tribunal further noted the above facts with a purpose in mind that even before framing the assessment, the Income-tax Officer had recorded his satisfaction of concealment and it is not a case where difference of 20% between returned and assessed income was meant to be utilized for levying penalty. While framing the assessment, the Income-tax Officer recorded his charge of concealment on 28.2.1973 in respect of three additions as follows:-

"I)	Unaccounted for woolen yarn and stock pledging with the bank (para 5 of the ITO's order)	Rs.2,45,600/-
ii)	Unaccounted for bank deposits Union Bank of India, Bombay (para 6 of the ITO's order)	Rs.65,696/-
iii)	Extra profit on wool tops (para 8 of the ITO's order)	Rs.42,230/-

The addition of Rs.65,695/- was deleted by the Commissioner of Income Tax by an order under section 264 of the Act and addition of Rs. 42,230/- was vacated by the Tribunal in quantum appeal in I.T.A. No.603 of 1973-74, which had become final. The addition of Rs.2,45,600/- was reduced by the AAC to Rs.2,11,000/- and at the Tribunals stage it further came to be reduced and retained at Rs.1,26,000/- on the ground entirely different than the one on which the original addition in a sum of Rs.2,45,600/- was made. The Tribunal while reducing the said addition in a sum of Rs.1,26,000/- observed that it was not an account of concealment of closing stock but there was an omission of not accounting for certain stocks. The benefit of enhancement of opening stock was allowed in the following year. The IAC in para 8 of his order held that assessee concealed the particulars of its income in respect of Rs.2,11,000/- and was liable to penalty. When this penalty was levied, the matter was not adjudicated by the Tribunal. The IAC noted in clear terms that the assessee was liable to penalty under Explanation to section 271(1)(c) of the Act in respect of addition of Rs.65,695/- and Rs.42,230/- and the assessee's filing of its return at Rs.3,17,641/- clearly brought it within the ambit of penalty provisions. As observed above, the two additions of Rs.65,695/- and Rs.42,230/- were ordered to be deleted one by the Commissioner of Income Tax and the other by the Tribunal. The IAC after observing that the assessee concealed particulars of taxable income in respect of Rs.2,11,000/- held that the facts connected with this part of concealment of income were very heavy and, therefore, it was not a case of minimum penalty of 100% but was a fit case for levy of 150%. The result was that with regard to the addition of Rs.2,11,000/-, penalty was worked

out @ 150% and with regard to other two items @ 100% was considered sufficient. This resulted in an imposition of penalty of Rs.4,25,000/-

When the assessee came before the Tribunal against the imposition of penalty of Rs.4,25,000/-, by that time only addition of Rs.1,26,000/- out of the addition of Rs.2,11,000/- was sustained. The Tribunal in para 10 of its order noted that on facts of the case and keeping in view the IAC's order particularly paras 8 and 9, there was no doubt that the revenue charged the assessee with actual concealment and the IAC's reference to Explanation u/s 271 (1)(c) was entirely superfluous and wrong. The Tribunal in paras 10 and 11 of its order dealt with the facts and in para 12 recorded the assessee's contention. The Tribunal, however, in para 14 of its order rejected the assessee's contention that a charge under the Explanation should be separately handed over to it. The Tribunal accepted the assessee's contention that since the phantom created by the revenue by making additions totaling Rs.4,25,000/- had simply vanished because of the Tribunal's decision in quantum appeal, the IAC's decision for levy of penalty cannot survive. The Tribunal also accepted the contention raised for the assessee that omission cannot give rise to any punishment for concealment. The Tribunal in para 15 of its order absolved the assessee from charge of concealment and in para 17 cancelled the penalty on three counts detailed therein."

We find that though the questions have to be answered against the assessee to the effect that explanation is part of the main provision as held by the Hon'ble Supreme Court in ***K.P. Madhusudhanan v. Commissioner of Income-tax*** (2001) 251 ITR 99 and no express invocation of explanation to Section 271 was required in a notice under

Section 271 of the Act, the explanation being part of the provision itself, from the findings recorded by the Tribunal, we do not find that any error has been committed by the Tribunal in deleting the penalty, levied on the assessee under Section 271(1)(c) of the Act on appreciation of material on record. Accordingly, we answer question No.3 against the revenue and in favour of the assessee.

The reference is disposed of, accordingly.

(ADARSH KUMAR GOEL)
JUDGE

September 15, 2006 **(RAJESH BINDAL)**
ashwani **JUDGE**